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Antitrust

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I. INTRODUCTION

The Eleventh Circuit handed down only two antitrust decisions in 1994.[1] Both affirmed judgments for defendants under the "state action" doctrine.[2]

II. SURVEY

Private conduct is protected from antitrust liability by the state action doctrine if (i) undertaken "pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation"[3] and (ii) "actively supervised" by the state.[4] On the other hand, municipalities and other local governmental entities have to satisfy only the first prong of this test to qualify for state action immunity.[5]

Anticompetitive behavior may be fully in line with a "clearly articulated and affirmatively expressed state policy" even if not expressly

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1. *See* FTC v. Hospital Bd. of Directors, 38 F.3d 1184 (11th Cir. 1994); Municipal Utilities Bd. v. Alabama Power Co., 21 F.3d 384 (11th Cir. 1994) (per curiam), *cert. denied*, 115 S. Ct. 1096 (1995); *see also* Gas Pump, Inc. v. General Cinema Beverages of North Florida, Inc., 12 F.3d 181 (11th Cir. 1994) (per curiam) (applying in part Georgia law) (administratively dissolved corporation and its sole shareholder lack standing to bring federal antitrust claim).

2. *See infra* text accompanying notes 3-49.

3. Hoover v. Ronwin, 466 U.S. 558, 569 (1984) (quoting Community Communications Co. v. City of Boulder, 455 U.S. 40, 54 (1982)).

4. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978)).

5. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985).

authorized by the state.[6] In *Town of Hallie v. City of Eau Claire*,[7] the Supreme Court held that it is enough if "[s]uch conduct is a foreseeable result" of a state regulatory scheme.[8]

By contrast, the "actively supervised" element of the state action exemption is more demanding.[9] State officials must "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[10]

In *Municipal Utilities Board v. Alabama Power Co.*,[11] the Eleventh Circuit considered for the second time whether the state action doctrine shielded a public utility and twenty-two rural electric cooperatives in Alabama from exposure under the Sherman Act[12] for allocating service territories. The court of appeals previously held that "[t]he Alabama Legislature has clearly articulated a policy to displace competition in the retail electric market . . . to prevent duplication of electric facilities" by enacting two statutes that incorporated the challenged territorial agreements.[13] However, because these private agreements were not in the record, the Eleventh Circuit remanded the case to the district court to determine whether the "actively supervised" part of the state action test was met.[14]

Although the agreements, standing alone, appeared to authorize the parties to divide new customers without the Alabama Legislature's approval,[15] the enabling legislation in issue expressly provided that "no subsequent agreement shall be valid unless and until it has been reviewed by the legislature."[16] The Eleventh Circuit accepted the district court's interpretation of this clause to mean that the Alabama Legislature explicitly had to approve any customer allocations by defendants even if, in the meantime, the affected customers might go

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6. *Id.* at 41-42.

7. 471 U.S. 34 (1985).

8. *Id.* at 42. In *Town of Hallie* the Court concluded that Wisconsin statutes authorizing municipalities to construct and operate sewage systems and to refuse to service unincorporated areas immunized the City of Eau Claire from antitrust liability for refusing to supply sewage treatment services to land owners in surrounding towns unless they voted to have their property annexed and to use the City's sewage collection and transportation services. *See id.* at 43.

9. *See* FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169 (1992).

10. Patrick v. Burget, 486 U.S. 94, 101 (1988).

11. 21 F.3d 384 (11th Cir. 1994) (per curiam), *cert. denied*, 115 S. Ct. 1096 (1995).

12. 15 U.S.C. § 1 (Supp. III 1991).

13. Municipal Util. Bd. v. Alabama Power Co., 934 F.2d 1493, 1502 (11th Cir. 1991). *See generally* Mullis, *Antitrust*, 43 MERCER L. REV. 999, 1018-20 (1992).

14. 934 F.2d at 1504-05.

15. 21 F.3d at 386.

16. *Id.* at 387 (quoting ALA. CODE § 37-14-36 (Michie 1992)).

without electricity.[17] The court of appeals refused to second-guess the wisdom of this legislative decision[18] or to look into whether it reflected the independent judgment of the Alabama Legislature.[19]

The state action doctrine also proved to be dispositive in *FTC v. Hospital Board of Directors*.[20] Again, it was found to be available to defendants.

The FTC brought suit under Section 7 of the Clayton Act[21] to prevent the Hospital Board of Directors of Lee County, Florida (the "Board"), d/b/a Lee Memorial Hospital ("Lee Memorial"), from acquiring Cape Coral Hospital ("Cape Coral"), a private, non-profit hospital.[22] According to the Commission, this transaction would be anticompetitive by reducing the number of general hospitals in Lee County from four to three and increasing Lee Memorial's market share from forty-nine percent to sixty-seven percent.[23]

The district court dismissed the case on summary judgment under the state action doctrine without any assessment of the actual competitive impact of the acquisition.[24] The Eleventh Circuit upheld this ruling.[25]

The Board is a non-profit public body created in 1963 by special act of the Florida Legislature "to establish and to provide for the operation and maintenance of a public hospital" in Lee County.[26] By virtue of this statute the Board acquired and expanded the hospital that later became Lee Memorial, which at that time had one hundred percent of the market.[27] The Board's enabling legislation was amended in 1987 to

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17. *Id.*

18. *Id.*; *accord, e.g.*, Hoover v. Ronwin, 466 U.S. 558, 574 (1994) (state does not have to act "wisely" to be entitled to state action immunity); Fuchs v. Rural Elec. Convenience Coop., 858 F.2d 1210, 1214 (7th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989).

19. 21 F.3d at 387-88 n.4; *accord, e.g.*, City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 377-78 (1991) (inappropriate under the state action doctrine to engage in subjective analysis of the politics behind a city ordinance); Traweek v. City & County of San Francisco, 920 F.2d 589, 592 (9th Cir. 1989).

20. 38 F.3d 1184 (11th Cir. 1994).

21. 15 U.S.C. § 18 (Supp. III 1991).

22. 38 F.3d at 1186.

23. *Id.* at 1186-87. Even without Cape Coral, Lee Memorial served 80% of Lee County's Medicaid patients, 75% of its indigent patients, and 90% of the county's "penetrating trauma" patients. *Id.* at 1186.

24. *See* FTC v. Hospital Bd. of Directors, 1994-1 Trade Cas. (CCH) ¶ 70,593 (M.D. Fla. 1994). The Board alleged that consolidating Lee Memorial and Cape Coral would increase operating efficiencies, reduce expenditures, alleviate Cape Coral's financial difficulties, and enable the two hospitals to become an effective bidder for managed care contracts in Lee County. 38 F.3d at 1186.

25. The acquisition was stayed pending appeal, which was expedited. 38 F.3d at 1187.

26. *Id.* at 1186 (quoting 1963 FLA. SPEC. LAWS ch. 63-1552 § 1)).

27. *Id.*

authorize it, among other things, to "establish and provide for the operation and maintenance of additional hospitals" in Lee County and to "control, any . . . corporation . . . or other organization, public or private, which the . . . [B]oard finds operates for the purposes consistent with, and in furtherance of, the purposes and best interests of [Lee Memorial] . . . ."[28]

It was uncontested that the Board is a political subdivision of the State of Florida and hence did not have to satisfy the "actively supervised" condition of the state action doctrine.[29] Nor was there any dispute that the Board was authorized to acquire Cape Coral.[30] The only question on appeal, therefore, was whether this authorization constituted a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation under the "foreseeability" standard of *Hallie*.[31]

The FTC maintained that a foreseeable anticompetitive effect "is one that ordinarily occurs, routinely occurs, or is inherently likely to occur as result of the empowering legislation."[32] As construed by the court of appeals, the Commission was "attempting to impose a narrow definition" of foreseeability that essentially turned it "into a test of inevitability, falling just short of requiring the state to expressly indicate its intention to displace competition."[33] Not surprisingly, the Board took a very different view. It contended that anticompetitive consequences are foreseeable for purposes of the state action doctrine if they "can reasonably be anticipated to result from the powers granted by the state."[34]

The Eleventh Circuit held that the Board had the better of this argument. After carefully reviewing the Supreme Court's opinion in *Hallie* and its own subsequent state action decisions,[35] the court of appeals "reject[ed] the suggestion that, in order to render anticompeti-

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28. *Id.* (quoting 1963 FLA. SPEC. LAWS ch. 63-1552 § 1, as amended by ch. 87-438, § 1; id. at § 23, as amended by ch. 87-438, § 7)).

29. *Id.* at 1188. *See supra* text accompanying notes 3-5.

30. 38 F.3d at 1188.

31. *Id. See supra* text accompanying notes 6-8.

32. 38 F.3d at 1188.

33. *Id.* at 1190.

34. *Id.* at 1188.

35. *See id.* at 1188-90 (discussing Askew v. DCH Regional Health Care Auth., 995 F.2d 1033 (11th Cir.), *cert. denied*, 114 S. Ct. 603 (1993); Bolt v. Halifax Hosp. Med. Ctr., 980 F.2d 1381 (11th Cir. 1993); Central Florida Clinic for Rehabilitation, Inc. v. Citrus County Hosp. Bd., 888 F.2d 1396 (11th Cir. 1989), *aff'd without opinion*, 738 F. Supp. 459 (M.D. Fla.), *cert. denied*, 495 U.S. 947 (1990); Commuter Trans. Sys. v. Hillsborough County Aviation Auth., 801 F.2d 1286 (11th Cir. 1986)).

tive conduct foreseeable, a state must enact either specific legislation from which anticompetitive conduct must ordinarily or routinely occur or specific legislation creating regulatory or monopolistic powers."[36] Rather, while the Eleventh Circuit acknowledged that the requisite foreseeability must be "more than merely 'plausible,'"[37] it ruled that "a foreseeable anticompetitive effect is one that can reasonably be anticipated to result from the powers granted to a political subdivision by the state."[38]

Nonetheless, the court of appeals was not willing to find this foreseeability simply from the broad language of the 1963 and 1987 statutes that, respectively, created the Board and expanded its powers.[39] Instead, despite the admonition in *Hallie* against overly intrusive investigations into legislative intent,[40] the Eleventh Circuit felt compelled to delve into "the context in which the instant legislation was enacted."[41] As it explained: "[A] foreseeability analysis cannot be done in isolation. To determine if specific anticompetitive consequences were foreseeable, we must examine what the Legislature knew about the market and the community at the time the legislation was enacted."[42]

The court of appeals thus pointed out that there was only one hospital in Lee County in 1963 when the Board was created, and that the Board used the powers given to it by the Florida Legislature to acquire this hospital and thereby obtain a monopoly of acute-care hospital services in Lee County for the past ten years.[43] Moreover, presumably with knowledge of this development, in 1987 the Florida Legislature expressly expanded the Board's existing implicit authority to acquire additional

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36. *Id.* at 1191. The FTC contended that the Board could not take advantage of *Hallie's* foreseeability test unless the state had granted it "either regulatory powers or the power to be a monopoly public service." *Id.* at 1191 n.5. The Eleventh Circuit concluded that the Commission was reading too much into *Hallie* by trying to restrict a state to "a binary choice between using regulation or monopoly public service in order to render a political subdivision's anticompetitive conduct foreseeable." *Id.* Nor was the court of appeals any more receptive to the FTC's argument that anticompetitive behavior of a political subdivision acting as a private party can never be foreseeable under *Hallie*. *Id.* (citing McCallum v. City of Athens, 976 F.2d 649, 653 n.7 (11th Cir. 1992) (proprietary nature of city's waterworks did not remove it from the state action exemption)).

37. *Id.* at 1191 n.6 (quoting FTC v. University Health, Inc., 938 F.2d 1206, 1213 n.13 (11th Cir. 1991)).

38. *Id.* at 1191 (footnote omitted).

39. *See supra* text accompanying notes 26 and 28.

40. *See* 471 U.S. at 44 n.7.

41. 38 F.3d at 1191.

42. *Id.* at 1192.

43. *Id.*

hospitals.[44] The Eleventh Circuit inferred from this history that the Florida Legislature "must have reasonably anticipated that further acquisitions, resulting from the 1987 legislation, would increase the Board's market share in an anticompetitive manner."[45]

The court of appeals then reinforced its reading of legislative intent by noting that in 1987 the Florida Legislature also passed a statute requiring a certificate of need to construct new hospital facilities.[46] Lee County at that time was at less than seventy-five percent of its licensed acute-care inpatient beds and consequently had no need for additional beds.[47] Accordingly, the Eleventh Circuit reasoned that "the acquisition of one of the three competing hospitals in Lee County was a foreseeable result of the Florida Legislature's granting the Board the authority to add new facilities to its operation."[48] Indeed, to the court of appeals, "*[c]learly*, anticompetitive conduct was reasonably anticipated."[49]

III. CONCLUSION

The antitrust workload of the Eleventh Circuit in 1994 matched its lowest in at least the past twenty years with only two decisions.[50] Not only did defendants prevail in both cases, but neither the private plaintiffs in *Municipal Utilities Board* nor the FTC in *Hospital Board of Directors* could even get to the merits of their antitrust claims because of the state action doctrine.[51] Last year's antitrust docket in the Eleventh Circuit was therefore almost a carbon copy of the 1992 term.[52]

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44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* (emphasis added).
50. *See* Ross, *Antitrust*, 44 MERCER L. REV. 1047, 1047 (1993).
51. However, the Commission was ultimately successful in blocking Lee Memorial's acquisition of Cape Coral when Cape Coral found itself another buyer rather than litigate all the way to the Supreme Court, which the FTC was prepared to do. *See FTC: Watch* No. 427, at 3 (Jan. 30, 1995).
52. *See* Ross, *supra* note 50, at 1055.